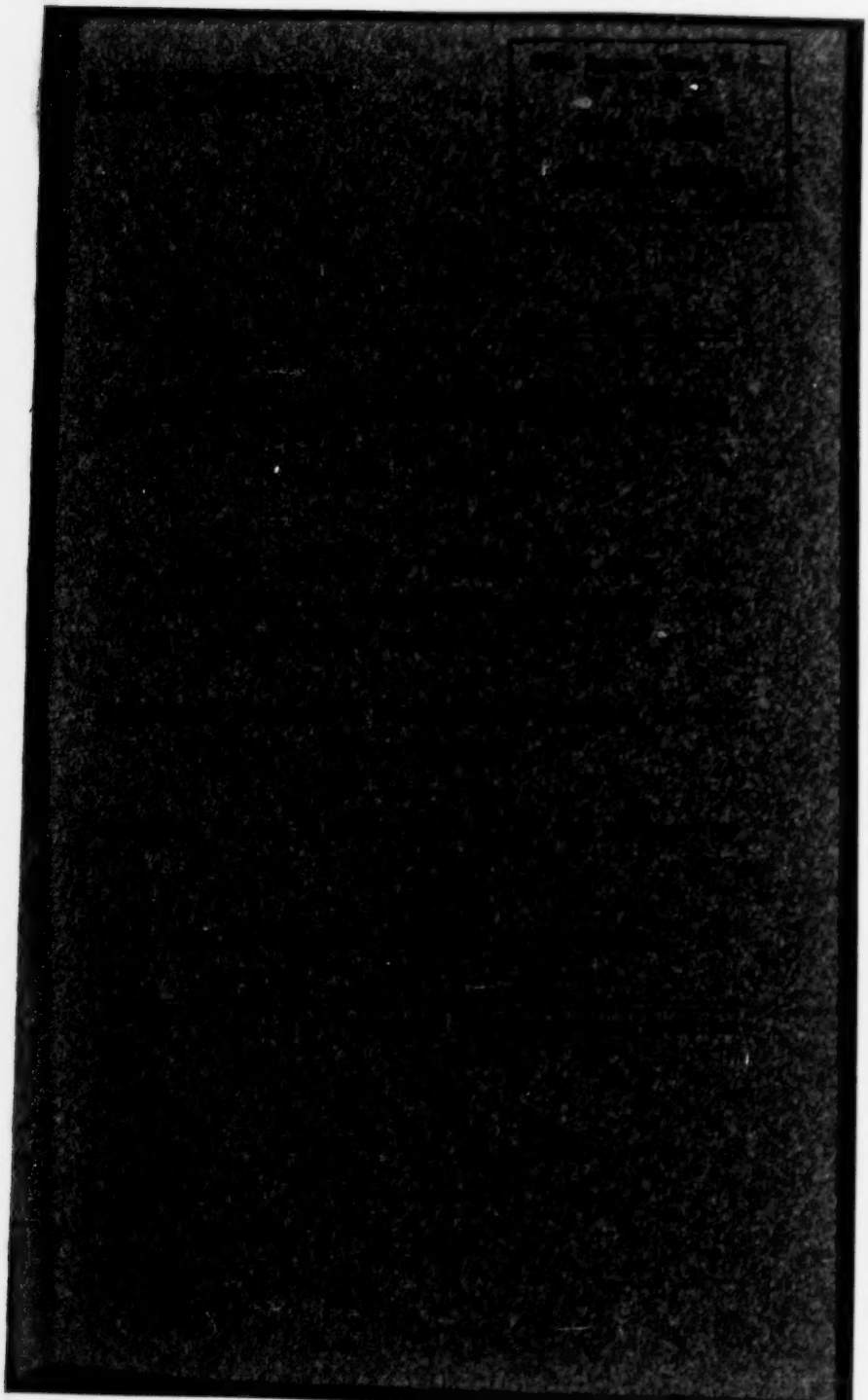

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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA EX REL. Milwaukee Social Democratic Publishing Company, plaintiff in error,
v.
ALBERT S. BURLESON, POSTMASTER-GENERAL of the United States.
No. 155.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT OF CASE.

The plaintiff in error, as relator, petitioned the Supreme Court of the District of Columbia for a writ of mandamus to require the Postmaster General to restore the newspaper called the Milwaukee Leader to the privilege of transportation in the mails as second-class matter. The case is before this court upon writ of error to the Court of Appeals of the District of Columbia, which affirmed the decision of the Supreme Court of the District of Columbia overruling the plaintiff in error's demurrer to the answer of the

Postmaster General, discharging the rule to show cause and dismissing the petition.

It appears that the Milwaukee Leader was received and circulated in the mails of the United States as second-class matter under a permit, issued upon request of the plaintiff in error, which contained a provision that "the authority herein given is revocable upon determination by the department that the publication does not conform to the law," and that said permit was revoked on October 3, 1917, on the ground that the publication was in conflict with the espionage law (act of June 15, 1917; 40 Stat., c. 30, p. 217) and not a "newspaper or other periodical publication" within the meaning of the law governing mailable matter of the second-class.

The case being presented on demurrer the averments of the answer stand as true, and the questions for decision here are whether, on the facts stated in the answer, the court will review the judgment of the Postmaster General; and, if the court will review the judgment, whether, on the facts stated in the answer, the Postmaster General should be required to revoke his order excluding the plaintiff in error's paper from the second-class mail privilege. In support of the affirmative of these propositions the plaintiff in error contends that the court has power to review said judgment, and should review it, because it was not based on a hearing as provided by law; because the facts stated in the answer do not show a violation of the provisions of the espionage law relating to newspapers, and the

judgment is therefore unfounded; and because the espionage law is unconstitutional so far as it attempts to forbid the publication of the particular matter prohibited by it, and so far as it denies mailing privileges to newspapers making such publication, thus leaving the action of the Postmaster General without sufficient warrant, even if the plaintiff in error's paper did violate the said law.

In amplification of the foregoing propositions the petition avers that the order of the Postmaster General has destroyed the property of the plaintiff in error without due process of law, deprived the plaintiff in error of the right of free speech, and is destructive of the rights of a free press; that the espionage law does not provide a due process of law to determine whether its provisions have been violated; that the offense defined in the law can only be determined after judicial consideration by a competent tribunal; and that the provisions of said law authorizing the Postmaster General to determine when an offense under said law has been committed do not afford to accused a right to trial in a court of competent jurisdiction. And it is asserted that the duties of the Postmaster General are purely ministerial, and no judicial power is reposed in him by the espionage law to determine issues of fact; that the law enacts authority for the Postmaster General to destroy valuable property upon his mere whim or caprice, and seeks to clothe an executive officer with power necessarily belonging to the judiciary; that each of the offenses for which the Postmaster General can exclude the offender from

the mails under said law are made criminal, and thereby complete protection and the agencies of punishment are afforded to the Government; that under the Trading with the Enemy Act, approved October 6, 1917, 40 Stat., c. 106, p. 411, after the espionage law, it is unlawful for any person to publish or transport any matter made nonmailable by the espionage law, so that in fact the action of the Postmaster General in declaring the Milwaukee Leader to be nonmailable brings into operation the Trading with the Enemy Act and makes criminal the publication or transportation of the paper without any further act or order.

THE ESPIONAGE LAW STATED.

The espionage law, Title I, provides:

> SECTION 3. Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, and whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

Title XII, of the same act provides:

> SECTION 1. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter or thing, of any kind, in violation of any of the provisions of this act is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. * * *
>
> SEC. 2. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter or thing, of any kind, containing any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States, is hereby declared to be nonmailable.

The facts upon which this case is before the court are developed entirely by the petition and answer. Certain alleged facts set up in the petition are either denied in the answer or strict proof thereof demanded, notwithstanding which the brief on behalf of the plaintiff in error treats some such allegations of the petition as established facts. In truth there has been a studied effort throughout the brief to create an atmosphere prejudicial to the Postmaster General and his assistants who, in conformance with their oaths of office, have endeavored in good faith to perform the duties imposed upon them by Congress for the protection of public interests during the greatest war in history, and this is done in

the interests of a publication backed by a set of men standing for a program aptly described by this court in the *Schaefer* case, in which this court said:

> But simple as the law is, perilous to the country as disobedience to it was, offenders developed and when it was exerted against them challenged it to decision as a violation of the right of free speech assured by the Constitution of the United States. A curious spectacle was presented: That great ordinance of government and orderly liberty was invoked to justify the activities of anarchy or of the enemies of the United States, and by a strange perversion of its precepts it was adduced against itself. In other words and explicitly, though it empowered Congress to declare war, and war is waged with armies, their formation (recruiting or enlisting) could be prevented or impeded, and the morale of the armies when formed could be weakened or debased by question or calumny of the motives of authority, and this could not be made a crime—that it was an impregnable attribute of free speech upon which no curb could be put. Verdicts and judgments of conviction were the reply to the challenge and when they were brought here our response to it was unhesitating and direct. We did more than reject the contention; we forestalled all shades of repetition of it, including that in the case at bar. (*Schaefer* v. *United States*, 251 U. S. 477.)

The constitutionality of the Espionage Act is vigorously attacked in the brief for plaintiff in error, but as

this court has sustained its constitutionality in a number of recent decisions, any argument on the part of the defendant in error on that point is unnecessary. *Schenck* v. *United States*, 249 U. S. 47; *Frohwerk* v. *United States*, id. 204; *Debs.* v. *United States*, id. 211; *Abrams* v. *United States*, 250 U. S. 616; *Schaefer* v. *United States*, 251 U. S. 466.

The only new feature developed in behalf of the plaintiff in error with respect to the constitutionality of the Espionage Act is the provision in the Trading with the Enemy Act which prohibits nonmailable matter from being published or transported through instrumentalities other than the mails, which it is contended shuts every avenue of transmission to nonmailable matter and it is maintained that this latter act is unconstitutional and renders the espionage law unconstitutional. Even if it were true that this provision of the Trading with the Enemy Act is unconstitutional, which is not admitted, that act having been passed by Congress under the broad war powers conferred upon it by the Constitution, it is nevertheless apparent from an inspection of the record in this case that the point can have no weight. The action of the Postmaster General complained of was prior to the passage of the Trading with the Enemy Act. If the espionage law was valid on October 3, 1917, when the decision of the Postmaster General was communicated, the constitutionality of the proceedings thereunder can not be affected by the Trading with the Enemy Act, passed after that date. However, the whole question here relates solely and

exclusively to the mailing privilege. The only statute which would be involved would be the one which affects the mailability of a paper like the Milwaukee Leader, namely, the provision with respect to the mails in the Espionage Act, the constitutionality of which has already been upheld by this court.

THE PRIMARY QUESTION.

The primary question in this case is, did the Milwaukee Leader violate section 3 of Title I of the said act. Did it (*a*) make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or promote the success of its enemies, or (*b*) wilfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States, or (*c*) wilfully obstruct the recruiting or enlistment service of the United States.

As to the meaning of and construction to be placed upon these three classes of offenses it should be observed that to fall within the first class, a statement must be false and may be intended to reach any person whose action might be a factor in the success of the United States in the war. This class is the only one in which the truth or falsity of the statement is an element of the offense, so that if the matter contained in plaintiff in error's paper violated the second and third classes of offenses under the act the truth or falsity of such statement is irrelevant.

The matter contained in the extracts from the Milwaukee Leader set forth in the answer is full of false statements. The court must take judicial notice of the falsity of the statements on at least one topic, i. e., that this war was declared by the United States solely and exclusively for the purpose of protecting the bonds of allied countries held by Morgan and other bankers and the profits of the munition makers. This statement of reason for the declaration of war is in complete contradiction to the resolution of Congress which declared—

> That the state of war between the United States and the Imperial German Government which has been thrust upon the United States is hereby declared,

and to the statement of the President in his war message which pointed out to the Congress as reasons why the said resolution should be adopted, that the German Empire had made war upon the United States by sinking our ships and taking the lives of our citizens, in violation of accepted principles of international law; that the declaration of Germany for unrestricted submarine warfare was not only an attack upon the United States, in violation of international law, but a demonstration that the peace of the world was necessarily in danger from the existence of an autocratic government which did not abide by international law, and that therefore the world could not be safe for democracy unless the United States successfully accepted the chal-

lenge. Needless to say, not a word about Morgan's bonds or munition makers' profits.

The legislative and executive branches of the Government thus solemnly stated the causes of the war. Can the judiciary hesitate about accepting them as true and properly branding the Milwaukee Leader's statements?

What legitimate purpose could be subserved by the publishing of such false statements? Can it be doubted that the statements tended to interfere with the operation and success of the military forces of the United States and to promote the success of its enemies? If that be their obvious tendency, as we shall hereafter point out, then the intent to accomplish those ends is established and the publication is criminal and not mailable.

The second class of offenses denounced by statute is attempts to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval service of the United States. While such attempt could be made by publication as well as by act, the publication would have to be intended to reach members of the military or naval establishments to predicate an attempt on them. As no such averment is contained in the pleadings, no attempt will be made to establish such an offense.

The third class of offenses declared by the act is the willful obstruction of the recruiting or enlistment service of the United States, to the injury of the service or of the United States. The meaning of

this language is clearly set forth in the decision in a similar case known as the Masses case, 246 Fed. 24:

> If the natural and reasonable effect of what is said is to encourage resistance to a law, and the words are used in an endeavor to persuade to resistance, it is immaterial that the duty to resist is not mentioned, or the interest of the persons addressed in resistance is not suggested. That one may willfully obstruct the enlistment service, without advising in direct language against enlistments, and without stating that to refrain from enlistment is a duty or in one's interest, seems to us too plain for controversy. To obstruct the recruiting or enlistment service, within the meaning of the statute, it is not necessary that there should be a physical obstruction. Anything which impedes, hinders, retards, restrains, or puts an obstacle in the way of recruiting is sufficient. (*Masses Pub. Co.* v. *Patten, Postmaster*, 246 Fed. 24, 38.)

See also—

Schenck v. *U. S.*, 249 U. S. 47.
Frohwerk v. *U. S.*, id. 204.
Debs v. *U. S.*, id. 211.
Abrams v. *U. S.*, 250 U. S. 616.
Schaefer v. *U. S.*, 251 U. S. 466.

Any utterance, therefore, whose natural effect is to retard or increase the difficulties of the process of raising an army or navy adequate for a successful prosecution of the war would constitute a violation of this clause of the espionage law.

The extracts from the plaintiff in error's publication set forth in the answer speak for themselves. Running through all of them, permeating all of them, and connecting all of them, there is a main, general, or principal theme that the war was entered into by the United States to save the bonds of the allied countries held by Morgan and his Wall Street associates; that this was the purpose of the war, and the statement of any other purpose is false and a piece of fraud and hypocrisy; that the war is for the big capitalists and for them alone, and that the President and Congress of the United States acted simply as the agents or tools of these big capitalists, including the munition makers; that not only was the war begun exclusively for the money profits of these big capitalists, but it is being continued exclusively for that purpose; that these big capitalists do not themselves do the fighting, but use the workers, that is, the working men, to do the fighting and the suffering and the dying, so that these big capitalists can continue their profits by means of this fighting and suffering and dying; that there is an attempt to fool the workers into fighting and dying gladly by fraudulently and hypocritically telling them that this is a war for democracy; that not only is it a war solely and exclusively for plutocracy, but, in order to fight the war for the big capitalists, democracy is being deliberately suppressed and destroyed in the United States. This theme is forcibly, cleverly,

brutally, and unmistakably set forth in page after page of the plaintiff in error's paper.

As the court well knows, and is expressly set forth in the answer, and must therefore be accepted as fact in this review, this theme, with its various variations, was being put forth from day to day during the period when the United States was engaged in raising its Army and Navy to war strength. The Navy was being raised to war strength solely by means of voluntary enlistments; the Army by both voluntary enlistments and draft. The speed and efficiency with which the draft could be executed would depend upon the number of exemptions claimed and the zeal with which the exemptions would be supported and fought for. Therefore, any utterance which would have a tendency to reduce the voluntary enlistments or increase the number and vigor of the exemption claims would inevitably impede and retard, and therefore obstruct the recruiting and enlistment service. The greater number of men called upon for enlistment or draft to join the military or naval forces must necessarily come from the greater number of the population, namely, the working class. Utterances, therefore, likely to reach large numbers of the working class and to influence them against voluntary enlistment or in favor of exemption claims, would necessarily tend to impede and obstruct the recruiting and enlistment service. The plaintiff in error alleges in his petition that the Leader has a circulation of 40,000 and is the organ of a great

number of labor unions, so that the paper during May, June, July, August, and September, 1917, was daily reaching or intended to reach large numbers of men eligible, by reason of age, to military or naval service. To tell these men that they are but cannon fodder to serve a struggle of money kings for money profits, and that they would be fools to believe that the war had any other or less sordid reasons for existence, played upon daily with cleverness and bitterness, obviously would cause many of them to go so far as to resist the draft, and would cause large numbers of them to withhold themselves from voluntary enlistment, and retard the draft services by increasing the claims for exemption and increasing the aggressiveness with which these claims would be supported. To reduce the fighting effectiveness of the United States in this war was the obvious result and the obvious purpose of the persistent, repeated presentation of the theme by the Leader. What other legitimate motive could it have had to fill its columns with this theme day after day during the very period when all the energies of the Government were enlisted in the raising of an adequate Army and Navy? Taking, therefore, the meaning of "obstruct," as laid down by the Circuit Court of Appeals in the *Masses Publishing Company* case and applying that definition to the matter contained in the plaintiff in error's publication, the court must inevitably come to the conclusion that the plaintiff in error's publication continually and consistently committed at least the

third offense denounced by the espionage law, and that it thereby became nonmailable under the law.

The record in this case establishes the fact of the continuous violation of the Espionage Act from day to day by this publication. It is immaterial whether or not each of its issues were examined, declared unmailable and prevented from passing through the mails. The matter carried by the various issues is now before the court with the ruling of the Postmaster General thereon in annuling the second class mailing privilege of the publication in question. It is manifest that as a matter of fact it was impossible for the postal establishment without vast additions to its force to locate and withdraw from the mails all of the millions of pieces of nonmailable matter placed therein during this war. The Court of Appeals in this case (Record, p. 52) said:

> We shall not review the articles from appellant's publication set forth in the answer, for when they are taken as a whole and considered in connection with the circumstances under which they were printed, we think the conclusion reached by the Postmaster General as to their purpose and effect was warranted. No one can read them without becoming convinced that they were printed in a spirit of hostility to our own Government and in a spirit of sympathy for the Central Powers; that, through them, appellant sought to hinder and embarrass the Government in the prosecution of the war.
>
> There would be no question, in our view, as to the authority of the Postmaster General to

> refuse the privilege of the mail to many, if not all, of the issues of appellant's publication between the dates mentioned, because they fall within the inhibition of the statute. (Id., p. 52.)

JURISDICTION OF POSTMASTER GENERAL.

The Court of Appeals of the District of Columbia, as stated, sustained the view of the Postmaster General with respect to the nonmailable character of the matter habitually carried by the Milwaukee Leader and declined to issue the writ of mandamus. However, in closing its opinion it made use of the following language (Rec., p. 52.):

> A more difficult question is presented, however, when we come to consider the right of the Postmaster General to make a blanket order refusing the second class mail privilege to that publication in the future, which in practical effect is a refusal of mail privileges. The statute contains no express grant of such authority. This is significant, in view of the fact that Congress deemed it necessary to grant such authority in respect to "any fraudulent lottery, gift enterprise, or scheme for the distribution of money," etc. (Section 3929, R. S.)

This expression has caused attorneys appearing here in the interest of the plaintiff in error to concentrate their attacks upon the power of the Postmaster General to revoke the second class mailing privilege of a publication on account of a violation of the Espionage Act.

The Court seems to have been under a misapprehension with respect to the source of authority

claimed by the Postmaster General for revoking second-class mailing privileges. The authority for the Postmaster General's action in this respect is the Classification Act, not the Espionage Act. The latter act simply fixed the status of certain matter which under the terms of the Classification Act was not entitled to the second-class privilege. (See Record, p. 5.) Furthermore, the Court was in error as to there being a distinction, in the respect suggested, between the fraud and lottery statute and the espionage law.

In case of the withdrawal of the second-class mailing privilege the Postmaster General does not make a blanket order refusing the second-class mailing privilege "in the future, which in practical effect is a refusal of the mail privilege," for the reason that if at any time after the revocation of a second-class mailing privilege permit the character of the publication is changed and left free of nonmailable matter and the publisher submits a new application to the Post Office Department through the local postmaster accompanied by copies of such new issues, which issues themselves evidence the fact that they are entitled under the law to be carried at the second-class rate of postage, a new permit must be issued. Such action on the part of the Post Office Department is, under the law, mandatory and enforceable through mandamus proceedings. In addition to this, the publisher loses nothing through the time consumed in his presentation and the consideration by the department of such

new application, for section 422 of the Postal Laws and Regulations, 1913, makes the following provision:

> SEC. 422. When an application has been made as provided in section 421, for entry of a publication as second-class matter, the postmaster shall issue to the publisher, on Form 3503, a permit conditionally accepting the publication, pending its classification, for mailing in the manner in which second-class matter is mailed (see sec. 465), and require a deposit of money sufficient to cover postage at the third-class rate—1 cent for each 2 ounces or fraction thereof—computed on each separately addressed copy or package of unaddressed copies offered for mailing pending consideration of the application. Such deposit shall not be taken up in either the postal account rendered to the auditor or the quarterly statement of pound-rate postage rendered to the Third Assistant Postmaster General, but shall be held in trust until the postmaster is advised as to its disposition. If the publication is admitted as second-class matter, the excess of the deposits over the second-class rates of postage shall be refunded. * * *

This aspect of the case was not discussed at the hearing and the Court of Appeals of the District of Columbia was manifestly not advised of this provision of the postal regulations. But anticipating the hardship that might be worked upon a publication which had once lost its second-class mailing privilege without the recognition of a right, by the postal establishment, to have the privilege reestablished upon

proper showing, the court closes its opinion in the following words:

> Should it [Milwaukee Leader] present for transportation in the mails "mailable matter of the second class" (Section 3877, R. S.), and the department should refuse to receive it, a different case would be presented. There is no showing here of such offer and refusal. (Rec., p. 53.)

The Court of Appeals was manifestly laboring under a misapprehension as to the postal laws and regulations with respect to the matter, for in no sense can the refusal to grant a permit or continue the second-class mailing privilege be "in practical effect a refusal of the mailing privileges" for the future.

THE CLASSIFICATION LAW.

The use of the mails is limited to certain classes of matter. These classes by section 3875 R. S., Act of March 3, 1879, c. 180, 20 St., 358, section 7, are as follows:

> First. Written matter.
> Second. Periodical publications.
> Third. Miscellaneous printed matter.
> Fourth. Merchandise.
>
> SEC. 10. That *mailable* matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within the conditions named in sections twelve and fourteen.

SEC. 12. That matter of the second class may be examined at the office of mailing, and if found to contain matter which is subject to a higher rate of postage, such matter shall be charged with postage at the rate to which the enclosed matter is subject: *Provided*, That nothing herein contained shall be so construed as to prohibit the insertion in periodicals of advertisements attached permanently to the same.

SEC. 14. That the conditions upon which a publication shall be admitted to the second class are as follows:

First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.

Second. It must be issued from a known office of publication.

Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications.

Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers: *Provided, however*, That nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.

> To the Third Assistant Postmaster General are assigned * * * the classification of mail matter. (P. L. & R. Ed., 1913, sec. 13, p. 26; *vide* generally P. L. & R., 1913, title "Second-class matter.")

All second-class matter must be mailable.

In order to come within the statutory privilege of enjoying classification as second-class matter, or in fact as any class of mail matter, the matter offered must in fact be mailable under some law. Unless it enjoys this status it is not assignable to any class of mail matter, for the law of classification by its own express terms can operate only upon *mailable* matter. The several classes of mailable matter are distinguishable from each other by their various characteristics, but matter of the first, third, and fourth classes is markedly distinguished from second-class matter, in that second-class matter covers not individual items of mail in existence, but matter conforming to certain requirements fixed in advance of the actual production of the matter, and the individual issues must continuously conform to the conditions fixed for that class. As a consequence a permit granting the second-class privilege must of necessity be based upon sample issues of the publication made up so as to meet the requirements of the statute, although the permit granting the second-class privilege must of necessity act *in futuro*. For that reason the Postmaster General is given authority by law to revoke second-class mail permits when he finds that the conditions which are *sine qua non* have ceased to be complied with.

In the very nature of things in the revocation of a permit the Postmaster General could in no case determine what a publication would do with respect to compliance with the law authorizing its permit except from samples of issues which had already been published. So when in the instant case the Milwaukee Leader, as established by the record from day to day, offered, under the generous terms of the second-class permit, nonmailable matter, the blanket right of that paper to the second-class privilege necessarily came into question, for if the individual issues of the paper are indubitably nonmailable, such nonmailability can not be divorced from them when considering them in the aggregate. Reversing the process, if a publication at the time of its application for a permit presented so many nonmailable numbers to the department with an application for the second-class privilege the permit could not be granted, as the matter would not comply with the very first essential to such classification—that is, that it must be mailable. Nor does it help the case of the plaintiff in error that it once enjoyed the privilege, for the law expressly reserves to the Postmaster General the right to revoke the privilege when the circumstances warrant such revocation.

There must be continuity of lawful issues.

So many of the individual issues of the plaintiff in error's publication having been found unmailable its status as a continuous publication became affected. For how can issues manifestly in violation of law be

set up as sufficient to preserve that continuity of issue required by the law to bring the case within the terms of the Classification Act requiring continuity of issue. (First condition, sec. 14, act of March 3, 1879, quoted above.) This has been the view of the Post Office Department from the passage of the Classification Act and the continuity of issue of a publication has been uniformly held to have been broken where issues in violation of law have been published. And this even though individual issues here and there might, if considered alone, be determined to be mailable if the matter carried was disassociated from the clearly nonmailable matter in other issues. In this connection attention is invited to the decision of the District Court for the Southern District of New York in the Masses case, see appendix hereto, in which the Court said:

> The hearing which the law requires to be given before a second-class privilege can be revoked would indicate that the past conduct of the magazine may be taken into account. Clearly the Masses in several of its recent issues violated the Espionage Act and upon this ground might properly be deprived of its privilege. The position of the Postmaster General that the privilege might be revoked because a magazine which published unlawful matter in some of its issues was not regularly issued within the meaning of the statute seems not unreasonable. That which must be regularly issued is a lawful magazine. If the publication contains matter in violation of law,

> it ceases to be a mailable publication at all, and hence can lay no claim to regularity of issue.

(See also *Jeffersonian Pub. Co.* v. *West*, 245 Fed. 585.)

The eligibility of a publication for the second-class permit must necessarily rest upon the matter carried in successive issues submitted to the Post Office Department for examination in connection with the application for the permit. When a publication is issued it must necessarily be upon the assumption, based upon past performance, the correctness of which the future can alone demonstrate, that the issues of the publication will continue to comply with the fundamental requirements of the law; so likewise once a permit is revoked it must necessarily be upon the assumption that the continued policy of the publication which has rendered its issues nonmailable will be continued until the publishers have disclaimed such intention and submit new issues which show that it has again become entitled by law to a reissue of the second-class permit.

The plaintiff in error received no vested right to have its publication received in the second-class mail by reason of the permit granted it. The permit itself contained the proviso that it should be "revocable upon determination by the department that the publication does not conform to law," and it is contended here that that determination has been made as provided by law.

It is clear that Congress, in the section of the espionage law relating to the mails, dealt with the administration of the post office as such and not with the question of crime created by other sections of the law. It did not there provide judicial procedure for the punishment of the crime but left it to fall within the general jurisdiction of the appropriate courts. It likewise left the mailing provisions to be enforced under the general jurisdiction of the Postmaster General theretofore established by law. The plaintiff in error was not entitled to a hearing in a court of the United States on the administrative question whether its paper had ceased to be mailable. The authority of the Postmaster General to settle such questions has been upheld in—

Horner v. *United States*, 143 U. S. 207.
Horner v. *United States*, 143 U. S. 570.
Public Clearing House v. *Coyne*, 194 U. S. 497.

In the last-mentioned case the court said, p. 509:

> As was said by Judge Cooley, in *Weimer* v. *Bunbury*, 30 Mich. 201, "There is nothing in these words ('due process of law'), however, that necessarily implies that due process of law must be judicial process. Much of the process by means of which the Government is carried on and the order of society maintained is purely executive or administrative. Temporary deprivations of liberty or property must often take place through the action of ministerial or executive officers or functionaries, or even of private parties, where it has

> never been supposed that the common law would afford redress." If the ordinary daily transactions of the departments, which involve an interference with private rights, were required to be submitted to the courts before action was finally taken, the result would entail practically a suspension of some of the most important functions of the Government.

And Id., p. 508:

> It is too late to argue that due process of law is denied whenever the disposition of property is affected by the order of an executive department. Many, if not most, of the matters presented to these departments require for their proper solution the judgment or discretion of the head of the department, and in many cases, notably those connected with the disposition of the public lands, the action of the department is accepted as final by the courts, and even when involving questions of law this action is attended by a strong presumption of its correctness. *Bates & Guild Co.* v. *Payne*, 194 U. S. 106.

The Milwaukee Leader was not being "published for the dissemination of information of a public character."

There is no claim here, nor could such a claim be established, that the Milwaukee Leader is devoted to literature, the sciences, arts or some special industry, such as are set out in the law; consequently in order to comply with the fourth condition of section 14 of the act of March 3, 1879 (20 Stat. 359), the paper

"must be originated and published for the dissemination of information of a public character."

As we have attempted to show elsewhere in this brief, discretion has been lawfully vested by Congress in the Postmaster General to do two things of vital import in this case. The first is to determine when publications comply, or cease to comply, with conditions authorizing the enjoyment of the second-class privilege; and, second, the determination of nonmailability of matter because violative of the Espionage Act.

The question then naturally presents itself: Did not the publication, in its daily misrepresentations as to the cause of the war as stated by the President and Congress and by its repeated efforts through the printed word to interfere with the conduct of the war in a manner prohibited by Congress, cease to be "published for the dissemination of information of a public character" within the meaning of the act, and place itself in the reverse of that position by becoming an agent for the dissemination of the seeds of disloyalty, insubordination, mutiny, etc., which Congress by solemn enactment had declared to be against the public policy of this Nation, indeed had in positive and specific terms declared such matter to be nonmailable and prohibited its carriage or delivery by the postal agencies of the Government, as well as stamped its dissemination as a crime indictable and punishable as a serious offense against the Nation itself?

Permitting the transportation through the mails of matter at the second-class rate—that is, at about

one-seventh of the actual cost of its handling to the postal service—is not, in theory, for the benefit of the publishers of the newspapers, though they do profit thereby, but it is a public charge upon the revenue of the Government to the end that the general public may receive as inexpensively as possible information of public benefit. The object of the Espionage Act, on the other hand, was to prevent public utterances and the dissemination of matter defined by the law as inimical to the public welfare. Thus, the Postmaster General and this court are confronted with the intent and purpose of the Congress in passing these two measures, i. e., the mail classification and the Espionage Acts. An examination of the two acts together, in the light of the facts in this case, would seem clearly to establish the proposition that when the plaintiff in error for a long period of time continuously published matter indubitably in violation of the Espionage Act, it therein and thereby ran counter to the expressed purpose and requirement of the Congress contained in the Classification Act that publications, in order to be entitled to be entered in the second class, must be published "for the purpose of disseminating information of a public character." To hold that the relator was meeting this requirement of the Classification Act while at the very same time its issues from day to day were violating the Espionage Act in the manner stated would be to impute to Congress inconsistent and irreconcilable purposes totally untenable.

The power of the Postmaster General to issue and revoke the second-class mailing privilege.

The Federal statutes recognize the existence of the power in the Postmaster General to issue and revoke the second-class mailing privilege. The act of March 3, 1901, 31 Stat., c. 851, 1107, provides that:

> When any publication has been accorded second-class mail privileges, the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested.

It may be said in this connection that the power to revoke second-class mailing privileges had been exercised from the date of the Classification Act to the passage of the above-quoted act under the broad principle of law that the power to grant a license carries with it the power to revoke in cases where the conditions of the license had been violated or where it had been issued through mistake.

POWER OF COURTS TO REVIEW.

In the foregoing pages we have assumed a burden greater than necessary in establishing that the publications in the Leader did violate the law. We have done this because of the slurs on the *bona fides* of the Postmaster General's conclusions by the plaintiff in error and so that the court can see that they are unfounded. Under such circumstances, the court may think it proper to rest its decision on the merits of said publications rather than on the presumption in favor of the correctness of the Postmaster General's conclusions, if it finds that said conclusions were

correct. It is well, at this point, however, to consider the power of the court to review and in reviewing the facts on which the action of the Postmaster General was based.

On these points no original argument of counsel is necessary. The Supreme Court of the United States in a number of cases has so clearly stated when, and the extent to which such actions will be reviewed, that the question can be submitted on that authority.

First, the court is not called upon to decide the correctness, in its view, of the decision, whether of law or fact, of the executive officer, unless there was no evidence, no fact or circumstances, before him upon which by any process of honest reasoning the decision could be justified, or unless it is clear that the action was based upon a clearly wrong interpretation of the law. In either of these cases the court might consider the action of the officer as arbitrary or the result of whim or caprice, not as an execution of a law, but rather as a maladministration of it.

The principle is stated in *Bates* v. *Payne*, 194 U. S. 106, 109:

> The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness,

and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing.

And it was also said:

> In the early case of *Decatur* v. *Paulding*, 14 Pet. 497, it was said that the official duties of the head of an executive department, whether imposed by act of Congress or resolution, are not mere ministerial duties; and, as was said by this court in the recent case of *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324: "Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction." (P. 109.)

Referring directly to the power of the Postmaster General to determine the classification of mail matter, the court in the same case said:

> But we think that, although the question is largely one of law, determined by a comparison of the exhibit with the statute, there is some discretion left in the Postmaster General with respect to the classification of such publications as mail matter, and that the exercise of such discretion ought not to be interfered with unless the court be clearly of opinion that it was wrong. The Postmaster General is charged with the duty of examining these publications and of determining to which class of mail

> matter they properly belong; and we think his decision should not be made the subject of judicial investigation in every case where one of the parties thereto is dissatisfied. The consequence of a different rule would be that the court might be flooded by appeals of this kind to review the decision of the Postmaster General in every individual instance. (P. 107.)

In *United States ex rel. Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, referring to the duty of the Secretary of the Interior to execute the laws which regulate the purchase, selling, and care and disposition of the public lands, the court said (p. 324):

> Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The court has no general supervisory power over the officers of the Land Department, by which to control their decisions upon questions within their jurisdiction. If this writ was granted we would require the Secretary of the Interior to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make. Mandamus has never been regarded as the proper writ to control the

> judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself. The writ never can be used as a substitute for a writ of error. Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the Secretary, furnish any foundation for the claim that mandamus may therefore be awarded. The responsibility, as well as the power, rests with the Secretary, uncontrolled by the courts.

In *Lane* v. *Mickadiet*, 241 U.S. 201, which involved a determination of facts by the Secretary of the Interior to entitle claimant to certain lands, the court said, p. 209:

> But it is said that the purpose of the statute was to give the recognized heir a status which would entitle him to enjoy the allotted land and not to leave all his rights of enjoyment open to changing decisions which might be made during the long period of the trust term and thus virtually destroy the right of property in favor of the heir which it was the obvious purpose of the statute to protect. But in last analysis this is a mere argument seeking to destroy a lawful power by the suggestion of a possible abuse. We say this because although it be conceded for the sake of the argument only that an exercise of power which was plainly an abuse of discretion depriving of the right which the statute plainly gave would be subject to correction by the courts, such concession would be here

without influence since there is no basis whatever upon which to rest an assumption of abuse of discretion.

So far as the Nebraska decree is concerned, the mistake upon which the proposition proceeds is obvious since, canceling the premise upon which it must rest to be well founded, it affords no ground for preventing by judicial action the exercise by the Secretary of his power to determine the legal heirs and in doing so to ascertain the existence of the Nebraska judgment, the jurisdictional outcome material of the court by which it was rendered and the legal effect which it was entitled to receive under the law of Nebraska.

* * * * *

It follows from what we have said that the court below was without jurisdiction to control the conduct of the Secretary concerning a matter within the administrative authority of that officer * * *

We submit that these authorities clearly show that mandamus will not lie to control or review the action of an executive officer which involves the lawful exercise of his judgment in determining the existence of the facts which form the basis for his action, except for the purpose of ascertaining if there has been a lack or abuse of that discretion which the law commands. So, in this case, there can be no review of the finding of facts by the Postmaster General, for, though the court may possibly draw a conclusion from the publications of the Leader not up in the answer different from that heretofore set

forth and different from that of the Postmaster General, it can not say that these conclusions are so unfounded and far fetched as to constitute an abuse of discretion.

Indeed, although at great pains to maintain the right of the court to review the facts, the plaintiff in error's brief does not seem to attempt to show that the articles in the Leader were not susceptible of the construction placed on them by the Postmaster General, nor does it suggest any other meaning of them, unless it be inferred from the general language used which appears to be rather a criticism of Congress for having by the Espionage Law created an offense in some manner vaguely within the twilight field whereby the right of honest criticism was destroyed and a supposed likeness of the Leader's publications to words of Lincoln, Webster, Clay, Sumner, Theodore Parker, Corwin, and Lloyd George in time of war, quoted, which are offered to "show that only the cowardly lack of true conception as to not only the right of free speech, but the duty of exercising that right, has been challenged in times of supreme crisis by these great outstanding figures."

The Hearing.

By act of Congress approved March 3, 1901 (31 Stat., p. 1107), it was provided that—

> when any publication has been accorded second-class mail privileges, the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested.

> without influence since there is no basis whatever upon which to rest an assumption of abuse of discretion.
>
> So far as the Nebraska decree is concerned, the mistake upon which the proposition proceeds is obvious since, conceding the premise upon which it must rest to be well founded, it affords no ground for preventing by judicial action the exercise by the Secretary of his power to determine the legal heirs and in doing so to ascertain the existence of the Nebraska judgment, the jurisdiction *ratione materiae* of the court by which it was rendered and the legal effect which it was entitled to receive under the law of Nebraska.
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forth and different from that of the Postmaster General, it can not say that these conclusions are so unfounded and far fetched as to constitute an abuse of discretion.

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The Hearing.

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> when any publication has been accorded second-class mail privileges, the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested.

Point is made that no "hearing" was had under this law. The record shows that the plaintiff in error was notified on September 11, 1917, that a hearing would be granted on September 22 to show cause why the authorization of admission of the Milwaukee Leader to the second-class mail matter should not be revoked on the ground that it was not a newspaper or other periodical publication within the meaning of the law governing mailable matter of the second class, it being in conflict with the provisions of the law embodied in section 481½, Postal Laws and Regulations, which contains the espionage law; that Victor L. Berger, the editor of said paper, appeared at the hearing accompanied by his attorney who was attorney for the plaintiff in error; that the hearing was before the Third Assistant Postmaster General, upon whom, in the due administration of departmental business, the duty of conducting the hearing devolved; that said hearing was conducted in accordance with established departmental practice after due notice to the plaintiff in error, who was afforded full opportunity to offer evidence and argument, of which it availed itself; that in accordance with departmental practice and also at the special instance and request of said Berger the Postmaster General affirmed and approved the finding of the third assistant. The answer denies that any inquiry was made at said hearing as to the specific article or offense charged.

The plaintiff in error's brief refers to the hearing as a "grotesque substitute" for due process of law (p. 15), but while replete with criticism of the procedure, it

fails to point out any particular in which the hearing lacked legality.

In *Smith* v. *Hitchcock* and *Tousey* v. *Hitchcock* 226 U. S. 53, criticism of a similar hearing met with this answer by the court:

> The decision that these weeklies are books shortens what needs to be said as to the sufficiency of the hearing. The parties were notified that they would be granted a hearing at the office of the Third Assistant Postmaster General, Washington, D. C., at a fixed day and hour, to show cause why the admission to the second class should not be revoked and the third-class rate of postage charged, on the ground that the issues were not periodical publications but were books. They sent a representative to Washington who left a printed response in advance, asking for further opportunity for argument if the authorities were not satisfied, and who called at the appointed time. He was referred to the Chief of the Classification Division, the proper person. Rev. Stat., sec. 161, Postal Laws and Regulations. Ed. 1902, sections 6, 19, subsection 1, 8. He saw him and asked if the brief had been received, was answered yes, and then asked if the other had any questions to ask and was answered no. He presented a pamphlet "The Influence of the Dime Novel" and departed, offering no further argument, seemingly somewhat aggrieved at not having seen the Third Assistant Postmaster General in person. Subsequently, the Assistant Attorney General for the Post Office Department was consulted by the

> officials; in accordance with his opinion the order was issued which the plaintiffs seek to restrain.
>
> The matter was argued to us with some feeling, and it is not impossible that the interview gave an impression of official indifference, but the plaintiffs allege in their bills that the question was a pure question of law; it was a question that they had a right to have reviewed and have had reviewed in this court; it was clearly defined; the official was not called on to state reasons or to discuss—his only duty was to hear and beyond offering the printed brief the plaintiffs' representative showed no desire to be heard. This is not a case in which even by manner or indirection the plaintiffs were prevented from offering material evidence. The facts and the question were as plain then as now. The conclusion reached was right, and in the circumstances disclosed, we are of opinion that the plaintiffs had no cause to complain (p. 60).

What did the Third Assistant Postmaster General refuse to hear in the present case? What evidence or statement of relator was refused a hearing?

PLEADING OVER.

The third assignment of error is: The court erred in affirming the action of the Supreme Court of the District of Columbia in refusing to the relator the right to plead over when the court overruled the demurrer of said petitioner. (Rec., p. 57.)

Plaintiff in error's brief makes no mention of this assignment and whether it will be abandoned or in-

sisted upon in argument we are not advised. The situation was unusual. The relator first filed eight pleas to respondent's answer (Rec., p. 46). Demurrer to the pleas was sustained on the ground that they amounted to no more than a demurrer to the return (p. 47); whereupon the relator declined to further plead and asked and received leave to demur to the answer (Rec., p. 48). On the hearing of this demurrer the decree sustaining the demurrer and dismissing the petition was entered with an exception to relator to the action of the court in denying leave to plead over (Rec., p. 48).

It will be observed that the usual order of pleading was reversed and while relator may have been entitled to plead over if it had demurred in the first instance, yet it had received permission to demur on the faith of its statement that it declined to plead further.

Having thus informed the court that it had no fact to plead, and diligent counsel now suggests no possible plea, it was not error for the court to hold the plaintiff in error to its statement. No possible injury thereby is suggested.

CONCLUSION.

It is respectfully submitted that there is no error in the judgment and it should be affirmed.

WILLIAM H. LAMAR,
Solicitor for the Post Office Department.
WILLIAM L. FRIERSON,
Solicitor General.

JANUARY, 1921.

APPENDIX.

THE MASSES CASE.

OPINION OF UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, RELATING TO REVOCATION OF SECOND-CLASS MAILING PRIVILEGE UNDER ESPIONAGE ACT (ACT OF JUNE 15, 1917).

United States District Court, Southern District of New York. Masses Publishing Co., complainant, v. *T. G. Patten, postmaster of the city of New York, defendant.*

AUGUSTUS N. HAND, *District Judge:*

This suit is brought to enjoin the postmaster of New York from treating the September issue of the Masses as a nonmailable publication and to require him to transmit it through the mails. A motion is made for an order *pendente lite* for substantially the same relief as prayed for by final decree.

The Postmaster General after a hearing revoked the privilege of the Masses to be transmitted as second-class mail matter in a communication addressed to the Postmaster of New York under date of August 15, 1917—

> Because it appears from the evidence in possession of the department that the publication is not a "newspaper or other periodical publication" within the meaning of the law governing mailable matter of the second class, and, furthermore, is not regularly issued at stated intervals as a newspaper or other periodical publication within the meaning of the law, it being in conflict with the provisions of the law embodied in section 481½, Postal Laws and Regulations.

Section 481½ of the Postal Laws and Regulations in substance prohibits the use of the mails to publications which violate the Espionage Act of June 15, 1917. Both the affidavit upon which the order to show cause was granted and the answering affidavit indicate that the September issue of the Masses has not been declared in itself nonmailable and that the question whether it is mailable or not has not come up for decision. The revocation of the second-class privilege appears to have been due to the fact that recent issues of the magazine contained nonmailable matter in violation of the Espionage Act. No attempt has been made to secure the transmission of the magazine under any other classification than that of second-class mail matter, nor has the necessary postage been paid under any other classification. The replying affidavit sets forth that the department has excluded the September issue from the mails under every classification, but I can not see that this is established by any decision rendered by the postal authorities.

It is unnecessary to decide whether the September issue standing by itself is a nonmailable publication. This would be determined largely by the result of the pending appeal from the order of Judge Learned Hand in the suit involving the August issue. In September the editor adopted a somewhat milder and less pronounced tone than in August, but continued to hold up violators of the conscription act to admiration and to say what he thought he safely could to promote opposition to the war and to undermine the successful conduct of it. Whether enough appears to constitute incitement to violation of law within the meaning of the Espionage Act may be a matter for future decision. The determination

of this question should not in my opinion depend upon the form of the appeal to the public but upon the natural and intended effect of what is said and done. A persistent propaganda by means of articles glorifying the deeds of notorious violators of the conscription act may promote disloyalty in the military forces and cause obstruction to recruiting as truly and designedly as words of formally direct incitement to violation of law. We are dealing with realities and not mere forms of expression, and our system of jurisprudence is neither so artificial nor impotent that the objects of the Espionage Act can be defeated by indirect methods. It is always to be remembered that the "Masses" is not attacking a mere party program or executive policy but is seeking to undermine those means which the Nation had adopted to protect the people of the United States as well as civilization itself from the assaults of a powerful foe after a declaration of war has been made by an overwhelming majority of both Houses of Congress. United effort in this war is plainly of the highest consequence, and the promotion of that united effort and inhibition of disintegrating forces were prime reasons for the passage of the Espionage Act. Whether the August and September issues present such a body or kind of material as to furnish the equivalent of direct incitement to violation of the law need not be decided now, but the ultimate construction of the Espionage Act as applied to publications such as the August and September issues will depend largely upon the importance which the appellate court attaches to the value of unrestrained freedom of speech under all circumstances.

The Government insists that it has done nothing further than to revoke the second-class mail privilege

in a lawful manner after affording the hearing provided for by the act of Congress. In making this decision the department took into consideration the contents of the June, July, and August issues of the magazine.

In the June issue Max Eastman said:

> We wish to persuade those who love liberty and democracy enough to give their energy or their lives for it to withhold the gift from this war and save it to use in the sad renewal of the real struggle for liberty that will come after it. We want them to resist the war fever and the patriotic delirium, the sentimental vanity, the sentimental hatred, the solemn hypocrasies of idealists, resist the ceremonious installations of petty tyrants in every department of our lives, resist conscription if they have the courage, and at whatever cost to their social complaisance save themselves for a struggle of human liberty against oppression that will be what it says it is.

The same author says at page 24 of the June issue:

> We brand the declaration of war by our Government as a crime against the people of the United States and against the nations of the world.

In the July issue Bertrand Russel writes at page 5:

> The young men of America will be performing the greatest possible service to those less fortunate contemporaries in Europe by maintaining throughout the remainder of the war the right of the individual to judge for himself whether he will engage in destruction at the bidding of men less wise and humane than himself or whether he will preserve inviolate the claim that a man's own estimate of right and wrong should be the ultimate arbiter of his conduct.

The foregoing excerpts plainly are direct appeals to resist conscription. The August issue of the Masses was filled with glorification of those who refused to enlist and violated the law, and the September issue contained similar matter in diluted form. Judge Learned Hand ordered the transmission of the August number through the mails because he thought it had not gone far enough to be treated as in effect inciting resistance to conscription, while Judge Hough in the Circuit Court of Appeals regarded this decision as so doubtful that he granted a stay of the order pending appeal. Such was the record of the Masses prior to the September issue, when the department revoked its second-class mailing privilege.

A publication to be entitled to second-class mail privilege must be regularly published at stated intervals. The Postmaster General in a report to the Senate says:

> In order for any publication to have the second-class privilege it must, among other things, be issued regularly at stated intervals, and in order to be permitted to the mails under any classification it must be mailable under the law.
>
> All of the publications, including the Masses, which have had the second-class privilege withdrawn on account of violations of the Espionage Act have lost that classification primarily for the reason that they were publishing matter which made their issues nonmailable under any classification, and hence are not newspapers or other periodical publications within the meaning of the law governing second-class mail matter.
>
> For many years this department has held publications not to be "regularly issued" in contemplation of law when any issue has con-

tained nonmailable matter; and when the second-class privilege has been withdrawn, under such circumstances, the formal notice of withdrawal has contained the statement that the second-class privilege has been revoked on both of the grounds stated.

As a matter of fact, in case of the Masses and other publications covered by the Hardwick resolution, following the usual practice of the department, not only have the particular issues which have been declared to be nonmailable but various other issues of the publication have been taken into consideration in determining their right to the second-class privilege, so that the final action was necessarily based principally on other and very much broader grounds than the break in the continuity of the publication.

The hearing which the law requires to be given before a second-class privilege can be revoked would indicate that the past conduct of the magazine may be taken into account. Clearly the Masses in several of its recent issues violated the Espionage Act and upon this ground might properly be deprived of its privilege. The position of the Postmaster General that the privilege might be revoked because a magazine which published unlawful matter in some of its issues was not regularly issued within the meaning of the statute seems not unreasonable. That which must be regularly issued is a lawful magazine. If the publication contains matter in violation of law, it ceases to be a mailable publication at all, and hence can lay no claim to regularity of issue. It was for this reason that the Masses was held by the Department not to be regularly issued and not for the absurd reason suggested at the argument that transmission had been interrupted by the stay of Judge

Hough. A more important ground of revocation than irregularity of publication was the illegality of matter contained in recent issues.

The second-class privilege was properly revoked, and as no attempt has been made to secure transmission under any other classification, the motion is denied.

SEPTEMBER 12, 1917.

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